combination for such a purpose is an unlawful conspiracy. The law will protect the victim and punish the promoters of such combinations. The offense is the combination for the unlawful purpose, accompanied by malice, and no overt act is necessary to constitute it.[34] But where the purpose is to increase wages and seek better working conditions by peaceful means, the combination is not unlawful, although the members persuade and entice non-union laborers to leave the employer by peaceful persuasion. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable unless there is actual malice. Malice, as here used, does not mean merely an intent to harm, but it means an intent to do a wrongful harm or injury, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done with intent and purpose of injuring another is not lawful competition.[35]

Power is given the Virginia General Assembly, by the State Constitution [36] of 1902, to enact laws preventing all trusts, combinations and monopolies inimical to the public welfare, but so far no statute has ever been passed on the subject.

CONSTRUCTION OF THE ESPIONAGE ACT.—With the gradual disappearance of the public intolerance during the period of war fever, the severe restrictions on liberal discussion of the origin, nature and policies of the war which were enforced by the Federal Courts in construing the Espionage Act, are becoming very evident. Inconsistencies of interpretation and indifference to settled principles of construction of criminal statutes, together with its unusual political aspects, have evoked vigorous criticism and demand for the repeal of the Act and amnesty for political prisoners thereunder convicted.[1]

As originally enacted, three offenses were established by the Act: (1) false statements or reports interfering with naval or military operations or promoting the success of enemies of the United States; (2) causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval

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[34] Crump *v.* Commonwealth, 84 Va. 927, 6 S. E. 620.

[35] Everett Waddey Co. *v.* Richmond Typographical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792.

[36] Article 12, § 165.

[1] See article "Freedom of Speech in War Time" by Zechariah Chafee, Jr., 32 HARV. LAW REV. 932. Also see "The Debs Case and Freedom of Speech" by Ernst Freund, 19 NEW REPUBLIC 13. Many cases involving the Espionage Act are printed in the BULLETINS OF THE DEPARTMENT OF JUSTICE ON THE INTERPRETATIONS OF WAR STATUTES. A valuable collection of cases decided before July 1918 has been published by Walter Nelles in a pamphlet, "ESPIONAGE ACT CASES," published by the National Liberties Bureau, New York.

forces; and (3) obstructions to enlistments or recruiting.[2] Because these provisions were not sufficiently effective against individual acts of disloyalty, on the recommendation of the Attorney General, Congress amended the original Act and added several more offenses: (1) saying or doing anything with intent to obstruct the sale of United States bonds, except by way of *bona fide*, and not disloyal, advice; (2) uttering, printing, writing or publishing any disloyal, profane, scurrilous or abusive language, or language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States, or (3) the Constitution, or (4) the flag, or (5) the military or naval forces, or (6) the uniform of the army or navy; (7) any language intended to incite resistance to the United States or promote the cause of its enemies; (8) urging curtailment of production of anything necessary to the prosecution of the war with intent to hinder such prosecution; (9) advocating, teaching, defending or suggesting the doing of any of these aforementioned acts; and (10) the use of words or acts supporting or favoring the cause of any country at war with the United States, or opposing the cause of the United States. Whoever commits any of these offenses while the United States is at war is liable to a maximum penalty of $10,000 fine or twenty years imprisonment, or both.[3]

The unprecedented scope of conduct which the Act covers gave little concern to the Federal Courts which upheld its constitutionality without discussion, and to the United States Supreme Court, which apparently assumed its constitutionality.[4] The doctrine that constitutional guaranties are to be held inviolate in times of public stress as well as in times of peace[5] proved unsympathetic to the Supreme Court in the leading case of *Schenck* v. *United States*,[6] where it was held that things which might be done and said in times of peace, are not to be protected by constitutional guaranties when the nation is at war. It has been repeatedly stated that the Espionage Act applies to willful false statements of *fact* and not to mere expressions of opinion, however unpatriotic or reprehensible,[7] but the actual decisions have evidenced no

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[2] Act of June 15, 1917, c. 30, tit. 1, § 3; 40 Stat. at Large 219; Comp. Stat. '18, § 10212 c.

[3] Amendment, Act May 16, 1918, c. 75.

[4] Dodge *v.* United States, 258 Fed. 300; United States *v.* Burleson, 258 Fed. 282; Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. 247; Debs *v.* United States, 39 Sup. Ct. 252.

[5] *Ex parte* Milligan, 4 Wall. 2.

[6] *Supra.*

[7] In United States *v.* Hall, 248 Fed. 150, Bourquin, J., said: "The Espionage Act is not intended to suppress criticism or denunciation, truth or slander, oratory or gossip, argument or loose talk, but only false facts willfully put forward as true, and broadly, with the specific intent to interfere with army or navy operations. The more or less public impression that for any slanderous or disloyal remark the utterer can be prosecuted by the United States is a mistake."

consideration for this principle, but have punished alike expressions of opinion as well as false statements of fact.[8]

In the first case involving the Espionage Act that was decided by the Supreme Court,[9] Justice Holmes stated that the true test of its violation is "whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." But nevertheless, in the Debs Case,[10] the grounds for his conviction were stated to be the natural tendency and reasonable possible effect of his speech to cause hostility to the draft act, regardless of the test of "clear and present danger" laid down previously. Thus the Supreme Court sanctioned the doctrine of "indirect causation" which is manifestly incompatible with a reasonable degree of freedom of speech. This doctrine was first enunciated by Judge Rogers in the case of *Masses Publishing Co.* v. *Patten.*[11] The substitution of this for the common law test of incitement [12] brought with it the principle of constructive intent, and men were convicted for words which were believed to have an indirect or circuitous tendency to foster insubordination, or hinder recruiting or enlisting, provided this specific intention existed, and the intenton itself was presumed because of the possibility of the effect.[13]

Proof of actual insubordination or interference with recruiting or enlisting, or evidence that any particular person was influenced by the alleged disloyal words is not necessary; [14] it is only necessary that there be an intention, or perhaps an attempt, to do the acts prohibited. And in the endeavor to suppress all appearances of disloyalty, the courts often paid but little respect to settled

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[8] The following are some of the expressions of opinion which have been construed as punishable under the Espionage Act: in United States *v.* Pierce, 245 Fed. 878, that the war was brought on by the capitalists; in Shaffer *v.* United States, 255 Fed. 886, that patriotism is identical with murder and the spirit of the devil, and that war is a crime, and it is yet to be proved whether Germany had any intention of attacking the United States; in United States *v.* Dembowski, 252 Fed. 894, that the Kaiser could lick England and France and will soon come to the United States; in Doe *v.* United States, 253 Fed. 903, that by clever lies spread by war parties in all countries the young men of the world are being duped into hating and killing each other; in O'Hare *v.* United States, 253 Fed. 538, that any person who enlisted for service in France would be used for fertilizer.

[9] Schenck *v.* United States, *supra.*

[10] Debs *v.* United States, *supra.*

[11] 246 Fed. 24. In this case the Circuit Court of Appeals overruled the decision of Judge Hand in the District Court.

[12] The common law test was followed by Judge Hand in the District Court in Masses Pub. Co. *v.* Patten, *supra.*

[13] Masses Pub. Co. *v.* Patten, *supra.*

[14] Deason *v.* United States, 254 Fed. 259; Shidler *v.* United States, 257 Fed. 620. But see Balbas *v.* United States, 257 Fed. 17.

principles governing criminal attempts. Often where they could not find the attempt they punished the intention.[15]

The dictum of Justice Holmes in *Schenck* v. *United States,*[16] that the character of every act depends upon the circumstances in which it was done, was claimed to support the decision that the act was broad enough to include statements calculated to produce the forbidden results even when made in the presence of persons not in the military or naval service.[17] It is even more difficult to reconcile the decision that mere words from which an intent to cause the forbidden acts may be presumed to violate the act, with the decisions that statements made by the defendant, in each case to a single person, in the course of a private conversation relating to the war did not constitute a violation of the Act,[18] and that the speech of an officer of a school district that he would "rather see a pair of old trousers hanging over the school than the United States flag" was also unpunishable.[19] The cases, however, are uniform in holding that willful intent is necessary to constitute an offense under the Act, and that *willful* means *intentional.*[20] Some courts have held that the Act thus forbidding willfully false statements interfering with the success of the military forces applies to the civilian population, but the operation of the Act has been almost universally confined to the military or naval forces. It has been maintained that the purview of the Act included all men between the ages of eighteen and forty five, having in view the Selective Service Act,[21] but this has been repeatedly denied.[22]

However praiseworthy may have been the sincerity of the courts in crushing all appearances of disloyalty during the war, our minds, now that the war is over, must revolt at the inconsistency in the construction of the Espionage Act which gave rise to such infractions of the fundamental rights of individuals, and which rendered inoperative the constitutional guaranty of freedom of speech.

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[15] Debs *v.* United States, *supra.* Also see article by Joseph H. Beale, "Criminal Attempts," 16 HARV. LAW REV. 491, and excellent criticism in 32 HARV. LAW REV. 417.

[16] *Supra.*

[17] Coldwell *v.* United States, 256 Fed. 805; Kirchner *v.* United States, 255 Fed. 301.

[18] Sandberg *v.* United States, 257 Fed. 643. This case is apparently opposed to Rhuberg *v.* United States, 255 Fed. 865.

[19] Von Bank *v.* United States, 253 Fed. 641.

[20] United States *v.* Nearing, 252 Fed. 223; United States *v.* Schulze, 253 Fed. 377. By "obstructing" recruiting or enlistment is not meant "preventing," but "making more difficult;" or anything which impedes, hinders, restrains or puts an obstacle in the way of recruiting. See Deason *v.* United States, *supra;* Masses Pub. Co. *v.* Patten, *supra.*

[21] United States *v.* Sugarman, 245 Fed. 604.

[22] United States *v.* Mayer, 252 Fed. 868.